



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Appeal 1039 of 2004

ALEXANDER TITUS MUNYI.....APPELLANT

VERSUS

LEWA WILDLIFE CONSERVANCY..... RESPONDENT

J U D G M E N T

On 3/12/2004, the appellant herein, moved to this Court, by way of an appeal against the Judgment/decree of the Senior Principal Magistrate, Milimani Commercial Courts, in CMCC 6439 of 2003, on the following 4 grounds of appeal:

The learned Trial Magistrate erred both in law and fact in:

- 1. Failing to appreciate the letter of 6/3/02 by the Respondent to the Appellant (which the Magistrate found as a fact to have been defamatory) was published when it was copied to the Labour Officer, Meru.**
- 2. Failing to appreciate that though the Defendant had a duty in Law to copy the letter of 6/3/02 to the Labour Officer Meru after sacking/dismissing the appellant the Respondent was also mandated (as it did) to sack/dismiss the appellant without necessarily writing that the appellant had been suspected of theft and the effect of the sacking/dismissal could have still been the same, hence the defence of justification on a privileged occasion could and cannot arise as the Magistrate found.**
- 3. Failing to assess the damages which she could have awarded the appellant if she could have found for him (it is trite law at the time of trial in such a matter) but which the Learned Trial Magistrate failed to and/or declined to do.**
- 4. Failing to appreciate that on the basis of materials and evidence placed on record before the learned trial magistrate – the appellant had actually proved his case on a balance of probabilities as required by law in all civil cases.**

Wherefore the appellant prays that the appeal be allowed with costs and the judgment of 26/11/04 dismissing the appellant's case, with costs, be set aside. That the court find in favour of the appellant and proceed to assess the damages payable to the appellant, a fresh, since this is not the last appellate court.

For clarity, and before dealing with the grounds of appeal, it is important to briefly state the facts, as per the lower court's record, arising from which the judgment appealed against arose. Those facts are as under:

The appellant was, at the material time, employed by the Respondent, as a receptionist. On the 6/3/02 the Respondent wrote, and according to the Appellant, published to the general public defamatory words to the effect that: **“your services have been terminated with effect from 6/3/02 on suspicion of theft from clients and staff tip box.”**

The Respondent denies malicious defamation of the appellant by the above words, and averred that the appellant’s dismissal was proper and lawful, and the only copy of the termination letter was sent to the Labour Officer, Meru, as required by the Employment Act.

At the hearing of the appeal herein, on 25/10/05, Learned Counsel for the appellant, Mr. Kariuki, abandoned ground of appeal No. 3, on the basis that it is an exercise in futility and impractical to embark on assessment of damages in the absence of proof of liability.

Turning to the rest of the grounds of appeal, the gist of the dismissal of the claimant’s case at the lower court, was that the defamatory letter, by the Respondent, dated 6/3/02, was not published, and in the absence of publication of the offending words, the appellant’s claim does not lie.

As defined **in WINFIELD & JOLOWICZ ON TORTS**, 16th Edition; 2002, at Page 404 **“Defamation is the publication of a statement which reflects on a person’s reputation and tends to lower him in the estimation of right thinking members of society generally or tends to make them shun or avoid him.”**

It is trite law that no matter how defamatory a statement may be about a person, there can be no action until, and unless, such a statement is communicated by the Defendant to a person or persons other than the complainant/claimant himself.

In the present case, counsel for the appellant submitted that the Learned Trial Magistrate erred in law in holding that the defamatory letter dated 6/3/02 had not been published. This contention is on the basis that the said letter had (a) been copied to the Labour Officer, Meru, (b) the letter had been hand-delivered to the appellant by the Respondent’s messenger, and without being in an envelope; (c) the letter had been published to the general public.

While not disputing the copying of the letter to the Labour Officer, Meru, the Respondent’s Learned Counsel, Ms Lavuna, submitted that such an act was on privileged occasion and in compliance with the provisions of Section 5 (4) (b) of the Employment Act, Cap. 226, Laws of Kenya. The statute provides:

“Upon the termination of every contract of service by dismissal the employer shall within seven (7) days deliver to a Labour Officer in the District in which the employee was working a written Report specifying the circumstances leading to and the reasons for dismissal.....”

Accordingly, the copying of the dismissal letter to the Labour Officer, Meru, was not only on privileged occasion, but also a mandatory statutory requirement. The Respondent had a legal duty to communicate the reasons for the dismissal of the appellant and the Labour Officer, Meru, had a reciprocal legal duty to receive the said communication.

Privileged communication offers complete defence against the claimant’s case. In the end therefore, this line of challenge of the Learned Trial Magistrate’s holding is legally flawed and lacking in substance.

I hold that the authority in **UNIVERSITY OF NAIROBI V. MBUTHIA [1985] KLR 821**, relied upon by counsel for the appellant, is easily distinguishable from the instant case.

There, the privileged occasion was held to be unavailable with respect to the three officers to whom the communication was published. Further, malice in the publication of the communication was proved against the appellant, which is not the case in the instant case before me.

On the alleged publication of the defamatory letter to other persons, other than the Labour Officer, Meru,

the evidence on record clearly shows that the publication/communication was by the appellant himself. He is the one who informed his wife and his church friends about the letter, not the Respondent. It would be a harsh proposition that the appellant can hold the Respondent liable for a defamatory statement or material intentionally published by the appellant himself.

I find no justification to interfere with the finding and holding of the Learned Trial Magistrate on the point.

All in all, I hold that the lower court's judgment properly dismissed the appellant's case. Accordingly, the appeal herein is dismissed with costs to the Respondent and against the appellant.

DATED and delivered in Nairobi this 24th Day of January, 2006.

O.K. MUTUNGI

JUDGE